IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 65 OF 2004

1) Mr. Sadanand Dattatraya Gaitonde,
major,

2) Mr. Ramaknt Dattatraya Gaitonde,
major;

3) Sharayu Dattatraya Gaitonde, major,

4) Audhut Dattatraya Gaitonde, major,

5) Smt. Jayanti Audhut Gaitonde,
(since deceased), represented hereby
legal representatives:

5a) Mr. Amit A. Gaitonde;

5b) Mr. Amrut A. Gaitonde;

6) Laxmikant Dattatray Gaitonde, major,

7) Ujvala Gaitonde, major;

8) Suresh Dattatray Gaitonde, major,

9) Nayan Suresh Gaitonde, major,

10) Umakant Dattatray Gaitonde, major,

11) Daya Umakant Gaitonde, major;

12) Prafulla Desai, major;

13) Shivaji Desai, major;

14) Sunanda Audhut Verlekar, major;

15) Audhut Verlekar, major;

16) Shashikant Dattatray Gaitonde, major,

17) Durga Narendra Rege (deceased)

through legal representatives:

17a) Narendra Rege;

17b) Mrs. Madhushri Ashok Tupat;

17c) Ashok Tupat;

17d) Mrs. Neemesha Manish Divecha;

17e) Mr. Manish Devecha;

18) Narendra Rege,

The appellant Nos. 1 to 5; and 8 to 11 and 16 are presently residing at Panaji-Goa; and the appellant Nos. 6 and 7 are presently residing at Sankhali; and the appellants No.12 and 13 are residents of Mandrem, Pernem, Goa; and the Appellant No.17 and 18 are residents of Corlim, Mapusa, Goa. ..... Appellants.

V/s.

Shrimati Sachidanand Saraswati Guru Shrimat Purnananda Saraswati Swami, as Head of Kavlem Math, Bachelor, residing at Kavlem, Ponda, Goa. Represented by his Attorney Raghoba Sinai Kavlekar, married, r/o. Kavlem, Ponda, Goa. ..... Respondents.

Mr. S.D. Lotlikar, Sr. Advocate with Ms. Shreya Naik, Advocate for the appellants.

Mr. A.N.S. Nadkarni, with Mr. M.M. Rao and Mr. H.D. Naik, Advocate for the respondent.

CORAM : B.H. MARLAPALLE, J.

Date of reserving the Order :
October 15,2004.

Date of pronouncing the Order :
November 04, 2004.

O R D E R :

Heard Mr. Lotlikar, the learned Senior Advocate with Ms. S. Naik, the learned Advocate for the appellants and Mr. A.N.S. Nadkarni, the learned Counsel, with Mr. M.M. Rao and Mr. H.D. Naik, the learned Advocates for the respondent.

2. This second appeal arises from the Decree dated 2.4.1992 passed by the learned Civil Judge, Sr. Division, at Bicholim in Special Civil Suit No.94/1976 and duly confirmed in Regular Civil Appeal No.27/1992 by the learned Addl. District Judge, vide her Judgment and Order dated 27.1.2004. Thus, the suit was pending for 16 years and the first appeal was pending for 12 years in the Courts below.

3. The Regular Civil Appeal was earlier decided on 18.4.2001 and when the said decision was challenged before this Court, it was remanded for adjudication by order dated 18.7.2001. The title of the suit which originally showed six plaintiffs, was allowed to be amended by showing the present respondent as the sole plaintiff as per order dated 16.3.1989 passed by the learned Civil Judge, Sr. Division. Thus, the sole plaintiff was Shrimat Sachidananda Saraswati Guru Shrimat Purnananda Saraswati Swami, Shri Sausthan Kaivalayapur, Kavlem, Chief Trustee of Kavlem Math, bachelor, residing at present at Kavlem, Ponda, represented by his attorney, Raghoba Sinai Kavlekar,

alias Raghoba Sinai Kavlekar, alias Raghoba Sinai, married, residing at Kavlem, Ponda Taluka, Goa.

4. The plaintiff contended that there is a property known as “Mattacodil” also known as “Bendebata” or “Swamibata” situated at Karapur of Sanquelim, Goa, bounded by :

On the north : By road and property belonging to Shambhu V.S. Borkar and others;

On the south : by property of Pundalik Bhat Pitre;

On the east : By nalla;

On the west : by the said property of Pundalik Bhat Pitre and road.

It was owned and possessed by Shri Purnananda Saraswati Swami, who was the predecessor of the plaintiff as the head of the Kavlem Math. The property was registered in the Revenue Taluka Office, Bicholim under Matriz No.99 in the title of the said Shri Purnananda Swami and it was surveyed (old survey) under No.244 and was registered also in the name of the said Swamiji. The property admeasured 5575 sq. metres as shown in the cadastral plan and as per the certificate issued by the Director of Land Survey, Panaji, the property had the following constructions :

(a) a Math which is a complex consisting of a small temple and a dwelling house;

(b) a dwelling house represented in the said plan under No.4 which is situated on the northern side;

(c) one cow shed made in laterite pillers, roof of tiles and walls

represented in the plan under No.13 and located on the western side of the property;

(d) a house on the southern side consisting of two parts represented in the plan under Nos. 11 and 12;

(e) a cow shed represented in the plan under No.7;

(f) one W.C. represented under No.8; and

(g) a construction with varandah on the southern side of the said Math represented in the plan as Nos. 9 and 10.

It was alleged that when the Government of Goa, Daman and Diu started new survey for the purpose of rights under the respective laws and regulations, the defendant No.1 unlawfully and wrongfully had stated to the Survey Staff that he was the owner of the suit property and in order to get the reregistration made in his name and accordingly, he changed the name of the property and declared that the property was divided into two parts, one named by him as “Lalbag Dandika Swami Math” and the other named “Vithalbata Mattacodil” and surveyed in the record of rights under No.71/2 and 73/2 respectively. As per the plaintiff, the said registration as managed by the defendant No. 1 was improper, illegal and invalid as the property exclusively belongs to him and was in his possession although the income of the rustic part of the property was received by defendant No.1 and his brother Soiru for consideration of the religious duties performed by them in the alternative years. As per the plaintiff, the huts shown in the plan under Nos. 1 and 2 and the mud house under No.3 were existing at the time of old cadastral

survey, but the same were no more when the suit was filed. In the small temple under No.5 in the plan, there is Samadhi of Swami Bramhananda and the dwelling house has two wings – one represented under No.6 and the other represented under No.6(a). In the wing under No.6(a), there is Samadhi of Swami Purnananda and the entry to both the wings under No. 6 and 6(a) is common. During the life time of Purnananda Saraswati Swami, the suit property was entrusted to one Madeva Vassudeva Botto, on the condition that he would render the irreligious services in the said Math. After the death of the said Madeva, his son Vassudeva took over the religious duties and subsequently, defendant No.1 and his brother Soiru Vassudev Gaitonde of Karapur continued to run the religious services in the alternate years. This religious service included "Puja" etc. of the said Samadhi. As the income of the rustic property was not adequate, Vassudeva was being paid a remuneration of Rs.75/- per annum and after defendant No.1 and his brother Soiru had taken other religious duties, the remuneration was increased to Rs.150/- per annum. These payments were being made against receipts and for other actual expenses, there was full reimbursement by the plaintiff.

5. The house represented in the plan under No.4 was constructed by defendant No.1 in the suit property with the permission of Shri Purnananda Swami and defendant No.1 sold the same to the plaintiff vide sale deed executed on 9.5.1952. The said

house was registered in the Revenue Taluka Office under No.447/128 in the name of the plaintiff. On the basis of the said sale deed, a certificate to that effect was also issued. This house has two divisions and one portion was occupied for about 4 years prior to the filing of the suit by one Shri Trivikram Kamat and the other portion was occupied by one Shrikant Kamat. Inspite of the said sale deed, defendant No.1 got unlawfully the said property registered in his name under Matiz No.478 and the registration was obtained on 9.10.1975. Similarly, defendant No.1, without the knowledge of the plaintiff, made construction vide No.9 and also No.10, in the plan, illegally and abusively in the suit property and when the plaintiff came to know of this fact, through his staff, defendant No.1 was warned to stop and to demolish the construction already made. Defendant No.1 had stopped further construction, but did not demolish the construction already made. The land covered by this illegal construction admeasured about 182 sq. metres.

Besides, defendant No.1 also constructed a cow shed shown in the plan under No.13 sometimes in 1975, thereby illegally usurping and occupying 50 sq. metres of the plaintiff's land. The plaintiff, therefore, filed the suit on the basis of the cause of action in 1972 and 1975 for declaration of ownership and also for direction to demolish the illegal construction.

6. In their written statement, defendant No.1 denied the

ownership title of the plaintiff as well as that of Shri Purnananda Swami to the suit property, including the status of the plaintiff as the Chief Trustee of Kavlem Math. They also did not admit that Shri Purnananda Swami was the predecessor of the plaintiff. As per the defendants, the plaintiff had no right or title whatsoever to the suit property and on this preliminary objection itself, the suit was required to be dismissed. They contended that there was no Samadhi of Swami Bramhananda, but it was a small temple with the Samadhi of Dandika Swami as shown in the plan under No.6. In respect of the title of the property, defendants claimed that they were rightful owners of the suit property through their ancestors. According to them, when Shri Dandika Swami attained Samadhi in Vithalapur Temple, Shri Satroji Rane Sardessai who was at that time incharge of Karapur Village arranged for the burial of the said Swamiji and appointed the defendants' ancestors to perform the daily puja of the said Samadhi and in the same year the said Shri Satroji Rane Sardessai gave by way of gift the property to the defendants' ancestors. The property was shown in the record of rights under Survey No.72/2 and Survey No.73/2. The gift was with the condition that they should perform the following duties, namely (1) to keep the Math clean, (2) to perform puja daily in the morning, (3) to offer food (Naiveydya) in the afternoon; (4) to offer Dhuparat at night; and (5) to celebrate the death anniversary of the said Swamiji on “Jayastha Krishna Panchami” every year. They further contended that in addition to the property, the defendants' ancestors were getting cash

amounts from several Gram Saunsthas, including Sakhali Gram Saunstha and after conquest of these Villages by the Portuguese, from the respective Village Comunidades. It was contended by them that from 1699 till date the said Samadhi was being looked after by the defendants' family

7. As per the defendants, the second Samadhi is of Shri Purnananda Saraswati who is one of the Swamis of the Kavlem Math and in the year 1799 A.D. when the said Swami Purnananda Saraswati visited the Math on his religious visits, he stayed there and fell sick. He attained Samadhi and as he was also belonging to the family of the defendants' ancestors, they performed the last rites and also built a Samadhi over the burial of the said Swamiji and this Samadhi was also being worshiped along with the Samadhi of the said Dandika Swami by the defendants' ancestors. The defendants admitted that they were performing the puja of the Samadhi of the said Shri Purnananda Saraswati and they were being paid Rs.150/- per year. The defendants had denied that Swami Purnananda Saraswati had improved the Math in 1935.

8. The plaintiff had examined in all six witnesses. PW.1 Raghoba Sinai Kavlekar, the constituted attorney, PW.2 Ramrai Sinai Dubhashi, PW.3 Soiru Gaitonde, the brother of defendant No.1, PW.4 Prabhakar Nadkarni, PW.5 Mangesh Nagarsekar, and PW.6 Purushottam Dalvi, who was a Surveyor. DW.1 died on 24.10.1983

during the pendency of the suit and, therefore, all his LRs. were brought on record. The defendants examined DW.1 P. Gonsalves, Surveyor, DW.2 Yeshwant Nanodkar, a tailor, DW.3 Atchut Kakatkar, a Priest, DW.4 Pandurang Mandrekar, a driver and DW.5 Avdhoot Gaitonde, a son of the defendants.

9. The plan of the suit property has been proved through the evidence of PW.1 and PW.5 and, therefore, it came to be marked as Exhibit PW.6/A. The General Power of Attorney is at Exhibit PW.1/A. After coming into operation the Bombay Public Trust Act, 1950, the Kavlem Math came to be registered as a Trust and in Charity Suit No.2203 of 1956 by order dated 10.10.1956, the Civil Court at Bombay had sanctioned the trust scheme. The same was further modified by order dated 27.8.1972, as is evident from the document at Exhibit PW.1/B. The Matriz Certificate at Exhibit PW.1/E shows that in the old Survey No.244, the property was standing in the ownership of Purnananda Saraswati Swami and Madeva Vassudeva Butto Gaitonde was rendering service to the Math and was in occupation. The document at Exhibit PW.1/H is the Will executed on 1.3.1951 by Shri Purnananda Swami before Shri Shantananda Sinai Nadkarni, acting Head Clerk and Notary Public of the Court of Justice of the Judicial Sub-Division of Ponda “Agnelo Moreira”. As per the said document Shri Purnananda Swami had expressed his last will to execute the Testament and which he actually did, as he had grown old according to the usages and customs which governed from time to

time being the succession in the Math, he appointed as his Shishya (disciple and successor) Bhalchandra, son of Ganpatrao Gaitonde and Krishnabai Gaitonde of Shahapur, Belgaum District and preceding the customary ceremonies, which were performed in the Khanapur Math on 16.7.1950 as his disciple and successor, with the name of Shri Satchidanand Saraswati and brought to him to the Math of Kavlem to live in his company as he the testator lived therein. As per this document the moveable and immovable properties of Shri Purnananda Swami who had succeeded his predecessor and Guru Shri Atmanand Swami was handed over to the plaintiff. The documents at Exhibit PW.1/I colly went to show that original defendant No.1 was being reimbursed by the plaintiff all the expenses incurred by him on the religious ceremonies of the Math. PW.2 to PW.5 also deposed that the suit property was owned by the plaintiff as the successor of Shri Purnananda Saraswati Swami and defendant along with his brother Soiru were the priests and they did not own the property. The evidence of PW.3 Soiru is unambiguous. He stated before the trial Court in his examination in chief : " The suit property was owned and possessed by Shri Purnananda Swami and it now belongs to Shri Satchidanand Saraswati Swami. I do not know how the plaintiff succeeded to the suit property. In the suit property, there exists a Math in which there exists two Samadhis, one of swami Purnananda and the other of Swami Bramhananda. Puja of the said two Samadis was entrusted to my grand father by name Mahadev Vassudev Bhat Gaitonde and he was enjoying the suit property. After

the death of my said grand father my father continued to render the religious services of the said Math and he was also enjoying the suit property. I say that thereafter, the said religious services were performed at the Math alternatively by me and my brother every year according to the wishes of my father. In the Math, there is no Samadhi of any Swami by name Dandikaswami". In his cross examination, this evidence was unshaken. He further stated that he was helping his father Vassudev in performing the Puja since 1927.

11. On the other hand, the defendants in support of their title to the suit property failed to bring any documentary evidence. Though along with the written statement a document at "Annexure A" was sought to be relied upon, but it was never produced on record and if there was any documentary proof in support of their title to the suit property, it was not difficult for the defendants to bring on record any such document through any of the five witnesses. PW.2 to PW.4 entered into the witness box only to describe the Math activities and stated that the original defendants were staying in the Math premises and they were in possession of the suit property. The testimony of DW.1, the so called Surveyor stands no where. It was emphatically stated by the defendants that Satroji Rane had gifted them or their predecessor the land in Survey No.72/2 and 73/2. The present suit property is part of Survey No.73/2, but so far as the defendants' claim in respect of Survey No.72/2 is concerned, at Exhibit-74 is a Certified true copy of the Decree dated 21.7.1989 passed by the learned Civil

Judge, Sr. Division, at Bicholim. This suit was filed by Shri Dinkerrau Anandrau Rane Sardessai against the defendants. The same stand was taken by the present defendants in the Regular Civil Suit No.1/1977. The trial Court held that Survey No. 72/2 is part of the property named “Lalbaga” and it belonged to the plaintiffs, i.e. Shri Dinkerrau Anandrau Rane Sardessai and his wife. The trail Court also held, on the basis of the evidence, that the plaintiff had proved that the defendant had no right whatsoever to the suit property. Thus, the defendants' contention that Satroji Rane Sardessai had gifted the land in Survey No. 72/2 was discarded by the trial Court and the decree has attained its finality.

11. Once the plaintiff had discharged his burden to prove his title on the basis of the record, the onus had shifted on the defendants to prove their title, which they utterly failed. In the case of **R.V.E. Venkatchala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and anr. (**(2003) 8 SCC 752), the Supreme Court stated :

> “In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma (AIR 1964 SC 136) there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is

> for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.
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> .... In the opinion of the two Courts below, the plaintiff had succeeded in shifting the onus on the defendant and, therefore, the burden of proof which lay on the plaintiff had stood discharged. The High Court, in exercise of its limited jurisdictions under Section 100 CPC, ought not to have entered into the evaluation of evidence afresh. The High Court has interfered with a pure and simple finding of fact based on appreciation of oral and documentary evidence which the High Court ought not to have done"

12. Both the Courts below were mindful that the title to the suit property as claimed by the prospective parties was required to be proved on the basis of the documentary record. The Matriz entry as noted above, clearly showed the ownership of Shri Purnananda Swami in respect of the suit property. The sale of the house under No.4 in the plan by the defendant No.1 to the plaintiff was not disputed at any time. The plaintiff became the sole successor of Shri Purnananda Swami as per the Will at Exhibit PW.1/H. The trust formation in 1956 and subsequent amendment in 1971 is only for the administration of the Math and the formation of the scheme for the governance of the Math as per the Order of the City Civil Court at Bombay has not, in any way, disturbed the plaintiff's title to the suit property and the said document cannot be interpreted to mean that the suit property was owned by the Trust. .

13. In the case of **Jagbir vs. Mahavir Prasad Gupta** (AIR 1977

SC 27) the Supreme Court held that where two lower courts arrived at a pure finding of fact as to whether a particular Khasra number containing the house in dispute was included within a Mouza to the whole of which the provisions of the Delhi Municipal Corporation Act had been plainly extended the High Court commits illegality in interfering with the finding of fact. In the case of **Ramanuja Naidu vs. V. Kanniah Naidu and anr.** (AIR 1996 SC 3021), the Apex Court stated :

> "... The admissibility of evidence is no doubt a point of law, but once it is shown that the evidence on which Courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the Courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. It has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the Court of facts and cannot be agitated in a second appeal."

In the case of **Dudh Nath Pandey (dead by LRs) vs. Suresh Chandra Bhattasil (dead by LRs.),** (AIR 1986 SC 1509), it was held that the High Court cannot set aside the findings of fact of first appellate Court and come to a different conclusion on reappreciation of evidence.

14. In the instant case, the trial Court on appreciation of evidence, recorded a finding that the plaintiff had proved his ownership to the suit property, as well as possession over the same

and the defendants failed to prove that Shri Satroji Rane Sardessai who was the incharge of Karapur Village had gifted the property now shown in the record of rights under Survey No.72/2 and 73/2 to their ancestors. Shri Mangesh Nargarsekar was working a Mamlatdar of Bicholim from 1974 to 1976 and he proved the Revenue documents at Exhibit PE-1/E recorded in the Matriz under No.99 and Exhibit PW.1/G which referred to the Matriz No.447 concerning the house existing in the Matriz No.99. His evidence further strengthens the case of the plaintiff regarding his title to the suit property. The lower appellate Court reappreciated the entire evidence and considered the observations made by this Court in Second Appeal No.37/2001 while remanding the Regular Civil Appeal for fresh decision. It was only regarding the description of the plaintiff and as recorded hereinabove, the said amendment was allowed by order dated 16.3.1989 itself. The contention of the defendants that the suit property's title was erroneous and on the basis of such a title, the suit could not have been entertained, is farfetched and has been rightly rejected by both the Courts below. On appreciation of facts and the evidence placed on record, the lower appellate Court, in its exhaustive reasoning, has confirmed the findings of the trial Court, with proper reasoning.

15. The title to the property, as noted earlier, was based solely on the documentary evidence and the same was successfully discharged by the plaintiff. The defendants could not place any record in support of their title. Under these circumstances, there is

no substantial question of law that arises for consideration in this second appeal. Mr. Nadkarni rightly referred to a three Judge Bench decision in the case of **Santosh Hazari vs. Purushotam Tiwari (deceased) by LRs.,** ((2001) 3 SCC 179) in this regard.

16. The defendants had specifically stated in their written statement that Shri Purnananda Swami died in 1799 at Karapur. This statement per se appears to be false because the Swamiji had executed the Will before the Notary on 1^{s} March, 1951 (Exhibit PW.1/H). This is one more ground to hold that the defendants had no title to the property and they were only staying in the property while discharging the religious duties and in lieu thereof, in addition to the income from the rustic property, they were also paid Rs.75/- or Rs.150/- per annum, as the case may be. After the Goa, Daman and Diu had undertaken the survey recording, defendant No.1 manipulated the record while he was in possession of the suit property and got his name entered as owner. The trial Court has taken a similar view in Regular Civil Suit No. 1/1977 filed by Shri Dinkerrau Rane Sardessai and his wife.

17. For all these reasons, the second appeal fails and hence, it is dismissed in limine.

B.H. MARLAPALLE, J

ssm.